916) 445-6453

October 12, 1982

Mr. Richard H. Moss
Pacific Gas and Electric Company
P. O. Box 7442
San Francisco, CA 94120

Dear Mr. Moss:

This is in reply to your letter to Glenn Rigby of August 18, 1982, in which you contend that PG&E conferred a non-real property right to the Horrs by agreeing to yield to a limited diversion of deemed unappropriated, surplus water. Specifically, your letter says that the provisions in paragraph I, B of the 1969 Indenture "for 'taking of water' are purely contractual and do not on their face or by operation of law convey any real or personal property right."

I submit that the contractual provisions in question did in fact transfer to the Horrs an interest in real property in the form of an easement. "An easement has been defined as an interest in land created by grant or agreement, express or implied, which confers on its owners a right to some profit or benefit, dominion, or lawful use out of or over the estate of another." Costa Mesa Union School District of Orange County v. Security First National Bank (1967) 254 Cal. App. 2d 4, 11. Civil Code Section 801 specifically provides that the right of taking water may be an easement.

In the case of Wright v. Best (1942) 19 Cal. 2d 363, one Kennedy, owner of a ranch near Rock Creek and an appropriative water right in Rock Creek, granted to a mining company the right to run gravel, dirt and mining debris into Rock Creek and released the company from any damages to him or his property. The agreement further provided that it "shall be binding upon, and available to the successors in interest of both parties."

In considering whether the agreement created an interest in real property or was merely a personal covenant binding only as between the original parties, the court stated at page 380:

> "Considering the express language of the agreement which the parties signed, it cannot be seriously argued that they intended to make a personal contract in the nature of a covenant not to sue, the force of which would automatically cease upon the conveyance by either of them of the property to which the contract related. The contract clearly and unambiguously grants to The Ruby Gold Gravel Mining Company the right to deposit tailings in Rock Creek from any of its mines forever, the right thus granted to be available to, and binding upon successors in interest and their respective properties. Undoubtedly, a perpetual right was intended."

The court continued on page 382:

> "The right clearly intended by the agreement is an easement annexed to the appropriative water right enjoyed by appellant, the waters of the creek to be used as a conduit to carry off the debris therein deposited from the claims worked by the Ruby Gold Gravel Mining Co. Although no authority has been cited for or against the proposition that an easement may be attached to a water right, there is no legal or practical objection to the creation of such an incident...Although an easement of pollution is not among the servitudes specified in section 801 of the Civil Code, that section does not purport to enumerate all the burdens which may be attached to land for the benefit of other property (citation omitted),...An appropriative water right constitutes an interest in realty (citations omitted). It can therefore appropriately serve as a servient estate to which an easement may be annexed."

The 1969 Indenture between PG&E and the Horrs provides that its provisions "shall bind and shall be for the benefit of the successors and assigns of the parties hereto." As in the Wright case, this language clearly indicates that the parties intended to create more than mere contractual rights enforceable

only between themselves. Moreover, that an easement for the taking of water was created in PG&E's water rights in this case is even clearer than the question of whether an easement for pollution was created in Wright because the former is listed in Civil Code Section 801 while the latter is not. While the water right burdened in this case would appear to be PG&E's downstream riparian right, there is no reason to distinguish this case from the Wright case on that basis because a riparian right is also real property Lux v. Haggin (1884) 69 Cal. 255, 391 as is an appropriative right. Nor is the duration of the agreement in this case any basis for distinction from Wright because an easement may be freehold or chattel real, according to duration and is an interest in real property in either case. Crowell v. City of Riverside (1938) 26 Cal. App. 2d 556.

Wright was cited with approval in United States v. 4.105 Acres of Land, etc. (1946) 68 F. Supp. 279. In that case, a private water company granted certain lands to the City and County of San Francisco and retained certain lands. As against the lands retained by the water company and as appurtenant to the lands conveyed to the City, the City was granted the right to divert underground waters to the extent of 15 million gallons daily subject only to the right of the water company and its successors to use the underground waters on the retained land for irrigation and domestic purposes. The retained lands were the subject of a condemnation action by the government. In holding that the grant created more than a contractual relationship between the parties, the court stated at page 289:

> "The granted water rights conferred a substantial and marketable property right in the City appurtenant to the lands conveyed to it. A corresponding burden was imposed on the retained lands restricting the uses to which they might otherwise lawfully be put when such uses conflict with the priority of right given the City.
>
> "Where, as here, the restrictive covenants create substantial and marketable property rights appurtenant to the lands benefitted, but distinct therefrom, to say in such case, that those rights are merely contractual, that they do not create a compensable interest in the lands burdened by the restrictions, that the government may take such lands (cleared, of course, of the burden of the covenants

> of the grant) and not be obliged to compensate for any present and estimable destruction or diminution in the value of those rights occasioned by the taking on some theory that strictly speaking, the rights did not create an estate in the lands, is too unconscionable to be supported in law."

From the foregoing, it follows that the right to take water arising from the 1969 Indenture is an interest in real property, that is, an easement appurtenant to the Horr land as the dominant tenement which burdens PG&E's downstream riparian water right as the servient tenement.

Accordingly, the proposed escape assessments appear to be legally correct.

Very truly yours,

Eric F. Eisenlauer
Tax Counsel

EFE:fr

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Legal Section